14 (4) No. 08-235

Supreme Court, U.S.
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In The Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

RICHARD MYERS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER

Respondents' Opposition serves only to underscore the pressing need for the Court to grant certiorari in this case. In asserting that the Court of Appeals correctly held that detainees in custody have no right to be free from torture or to be free from abuse in the practice of their religion, the Opposition relies on certain critical propositions of law that are demonstrably wrong and require correction by this Court. Respondents' argument that petitioners are not "persons" improperly and exclusively focuses on one stated purpose of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, wholly ignoring a separate and broader stated purpose. And respondents' argument that petitioners have no rights under the Constitution not to be tortured reflects a refusal by government officers, yet again, to accept the holdings of this Court with respect to Guantánamo detainees, and specifically its ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the "substantive guarantees of the *Fifth and Fourteenth Amendments*" apply to foreign nationals held at Guantánamo. *Id.* at 2246 (emphasis in original). Respondents suggest this case is not "the proper vehicle" (Opp'n 9) for addressing these issues, but petitioners respectfully submit that it is difficult to conceive of a case better suited to address the issue of whether Guantánamo detainees are "persons," and whether they have a Fifth Amendment right not to be tortured.

I. PETITIONERS' RFRA RIGHTS WERE CLEARLY ESTABLISHED AND RESPONDENTS' GROUNDLESS CLAIM OF QUALIFIED IMMUNITY IS NOT A REASON TO DENY CERTIORARI.

Respondents argue (Opp'n 10-15) that this Court, like the Court of Appeals, should read the RFRA statute with blinders on. According to respondents, RFRA has only one purpose, to "restore the compelling interest test" applicable to First Amendment free exercise cases prior to this Court's decision in *Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Yet RFRA itself announces two distinct purposes. One is certainly to restore the compelling interest test. The other, equally important, stated purpose is to provide a right of action to persons whose religious free exercise is substantially burdened by the government. Respondents next argue that aliens detained at Guantánamo are not "persons" within the meaning of RFRA because they do not enjoy an independent right of free exercise under the Constitution. Even if respondents' conclusion were true, there is nothing whatever in RFRA that so limits the plain meaning of the word "person." Lastly, respondents urge the Court to skip over the antecedent question whether petitioners have rights under the statute because respondents claim to be entitled to qualified immunity in any event. Under this Court's longstanding precedent, there is no basis for this proposed sequence, and even less for a finding of qualified immunity.

A. Respondents Violated RFRA.

RFRA is a straightforward statute which provides a cause of action to all "persons" burdened in the exercise of their religion without any limitations of geography, status or citizenship. The statute recites two separate and independent purposes: "The purposes of this chapter ***are***—(1) to restore the [pre-*Smith*] compelling interest test ...; ***and*** *(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.*" 42 U.S.C. § 2000bb(b) (emphasis added). Like the Court of Appeals, respondents read out of the statute the second stated purpose and then argue that the statute's purpose is "merely" to codify pre-*Smith* jurisprudence. That is not what the statute says.

RFRA precludes the federal government, each and every one of its officers, and any official of a "covered entity," 42 U.S.C. § 2000bb-2(2), from infringing on any "person['s]" exercise of religion unless the restriction is the "least restrictive means of furthering [a] compelling governmental interest." *Id.* § 2000bb-1(b)(2); S. Rep. 103-111, at 2, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. RFRA also specifically creates a private cause of action against government officials who violate its terms. 42 U.S.C. § 2000bb-1(c).

In defining the term "covered entity" to include the "District of Columbia, the Commonwealth of Puerto Rico, and *each territory and possession* of the United States," *Id.* § 2000bb-2(2) (emphasis added), RFRA reaches the conduct of

federal officials that occurs not only within the continental United States, but also within its territories and possessions. *See, e.g., Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (applying RFRA to conduct in Guam). Military bases under long-term leases are U.S. "possessions." *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 389-90 (1948). It is well-established that RFRA applies to the military. *E.g., Veitch v. Danzig*, 135 F. Supp. 2d 32, 34-35 (D.D.C. 2001); *Rigdon v. Perry*, 962 F. Supp. 150, 160-61 (D.D.C. 1997). RFRA contains no restrictions suggesting that its protections are limited to persons living in the United States, or to citizens, or to any other defined group. This Court has long held that an unambiguous statute is to be applied according to its "ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). There is nothing arcane or confusing about the term "person." As the district court held and Judge Brown in her concurrence recognized, "Congress 'did not specifically intend to vest the term 'persons' with a definition ... at odds with its plain meaning.'" App. 59a (internal notations omitted). Respondents' entire argument is premised on such an obdurate misconstruction.

Moreover, if respondents (and the Court of Appeals) were correct that a cause of action under RFRA depends upon the plaintiff also having clearly established constitutional rights, RFRA's private cause of action would be unnecessary and entirely duplicative of a *Bivens* action. It is precisely because RFRA protects conduct and persons not protected by the First Amendment that its enactment was necessary.

It is indisputable that respondents' conduct constituted a clear violation of RFRA. The district court found that respondents' religious harassment, including "[f]lushing the Koran down the toilet and forcing Muslims to shave their beards[,] falls comfortably within the conduct prohibited from government action by RFRA." App. 93a-94a. In short, petitioners have rights under the plain language of RFRA, and respondents violated those rights.

B. The Court Should Resolve the Antecedent Question of Petitioners' RFRA Rights Before Turning to the Ancillary Question of Qualified Immunity.

Respondents argue (Opp'n 12) that this Court should not reach the question of whether petitioners have rights under RFRA, because those rights were not clearly established at the time of the conduct. Respondents' proposed sequence would leave in place the Court of Appeals' patently incorrect interpretation of RFRA and its pernicious conclusion that Guantánamo detainees are "non-persons," as well as turn this Court's immunity jurisprudence on its head. For this reason alone, certiorari should be granted.

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated the proper analytic sequence, which is to consider first the "threshold question" of the existence of the right, and only when that is resolved, to proceed to the question of whether the

right was clearly established at the relevant time. *Id.* at 201. As the Court observed, "This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question of whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Id.* *See also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Respondents suggest (Opp'n 17 n.8) that this Court may be reconsidering the analytic sequence mandated by *Saucier*. *See Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (07-751; argued Oct. 14, 2008). But even if the Court decides in *Pearson* to relax the compulsory *Saucier* sequence, that sequence would still be appropriate here. The issue of detainees' religious rights continues to be relevant to hundreds of detainees and to the military officers responsible for their incarceration. As the United States observed in its amicus brief filed in *Pearson*, the sequence established in *Saucier*, "provide[s] useful clarification to future courts and to government officials." Brief for the United States as Amicus Curiae Supporting Petitioners at 24, *Pearson v. Callahan*, No. 07-751 (June 13, 2007). The instant case is precisely the type of case in which the existence of the right should be decided first. *Id.* at 25 (*Saucier* sequence should be retained in cases involving issues of "general application and recurring importance," in contrast to cases involving "factual nuances" or "totality-of-the-circumstances.")

The Court's concerns about the *Saucier* sequence, moreover, are not implicated in petitioner's RFRA claim. Petitioners' claim under RFRA requires this Court to engage only in statutory, not constitutional, construction. Thus, the Court's concern about avoiding, where possible, complicated issues of constitutional interpretation, which underlies its discomfort with the mandatory *Saucier* sequence, *see Brosseau v. Haugen*, 543 U.S. 194, 201-02 (Breyer, J., Scalia, J. and Ginsburg, J., concurring), is simply not at issue here.

C. Respondents Are Not Entitled to Qualified Immunity for RFRA Violations.

As the district court stated, "[t]o be absolutely clear, the plaintiffs are not alleging some novel statutory violation, one in which the defendants can reasonably claim qualified immunity." App. 97a. Respondents' suggestion that it was reasonable as a matter of law for federal officers to ignore the broad and unconditional language of RFRA which they were clearly violating, and unilaterally to imply non-existent exceptions and limits on its terms, is simply untenable.[1] It is never reasonable to ignore the plain terms of a statute.

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[1] The unreasonableness of respondents' position is highlighted by the fact that respondents' conduct also clearly violated Army Regulation 190-8, which requires military personnel to respect a prisoner's free exercise of religion. Army Reg. 190-8 1-5(g)(1); *id.* at 6-7(d)(1). Accordingly, there can be no question that respondents had fair warning that their conduct was illegal. *Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002).

Despite RFRA's unconditional language and the uniform prohibition of religious abuse of prisoners, respondents assert (Opp'n 16) that a reasonable officer could have "doubted" whether RFRA applied at Guantánamo. The logical contortions necessary to reach such a "doubt" fatally undermine respondents' argument that such "doubt" could be reasonable as a matter of law. In order to conclude that RFRA did not apply to their conduct, respondents would have had to: 1) ignore the plain language of RFRA, its legislative history and Supreme Court precedent; 2) ignore other regulations and laws prohibiting the same conduct; 3) read into RFRA a geographic exclusion of Guantánamo that appears nowhere in its text; 4) read into RFRA a restriction on standing, excluding aliens detained by the military, which also appears nowhere in the statute; and/or 5) presume the legality of outrageous offenses against the religious beliefs of detainees, which are anathema to the principles of religious liberty and tolerance on which this country was founded and the Constitution respondents are sworn to uphold. Respondents cannot rely on unstated exclusions to unambiguous statutory language to justify their egregious behavior. No qualified immunity protects their patently unreasonable conduct.

In trying to argue that their interpretation is reasonable, respondents resort (Opp'n 10) to the *reductio ad absurdum* that petitioners are somehow seeking to provide a cause of action to "any individual anywhere under any circumstances—an interpretation that would apply not just to Guantanamo detainees, but to any detainee held in

any detention facility during any war." This is a straw man. RFRA itself permits restrictions on religious practice as long as they are the least restrictive means necessary to achieve a compelling governmental purpose. Plainly, the protection, if any, to be accorded religious free exercise in an active war zone may be different from that which is permissible in a territory thousands of miles from a war zone, where the U.S. has *de facto* sovereignty and has been holding detainees without charge for years. *Rasul v. Bush* ("*Rasul I*"), 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) (recognizing difference between exigencies of battlefield and conditions of detention). In any event, there can be no doubt that U.S. officials should not direct that Korans be thrown in toilet buckets to humiliate detainees anywhere or anytime, and respondents could have been in no reasonable doubt that this was the case.

II. THE RIGHT NOT TO BE TORTURED IS PROTECTED BY THE FIFTH AMENDMENT, WHICH APPLIES AT GUANTÁNAMO.

Since detention began at Guantánamo in 2002, this Court has repeatedly affirmed that detainees possess cognizable rights under the laws of the United States and the Constitution. *Rasul I*, 542 U.S. at 483-84; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene*, 128 S. Ct. at 2240. Yet the Government continues to press highly constricted interpretations of these holdings, often successfully in the lower courts, and now, nearly seven years

since the first detainees arrived at Guantánamo, some 250 men remain incarcerated and, in respondents' view, unprotected from torture. Respondents' opposition prefigures the same unfortunate dynamic occurring yet again. Despite this Court's clear statement that the "substantive guarantees of the *Fifth and Fourteenth Amendments,*" 128 S. Ct. at 2246 (emphasis in original), apply to foreign nationals, like petitioners, "who have the privilege of litigating in our courts," *id.*, respondents assert that the holding of *Boumediene* is limited to the Suspension Clause, stating:

> Thus, *Boumediene* did not overturn the Court's prior rulings that the individual-rights provisions of the Constitution run only to aliens who have a substantial connection to our country and not to enemy combatants who are detained abroad. In *Johnson v. Eisentrager*, for instance, this Court had addressed whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general and Fifth Amendment rights in particular, and it held that they did not. Later decisions reaffirmed that holding.... The court of appeals' decision remains correct following *Boumediene*.

(Opp'n 18-19 (internal citations omitted)) Thus, according to respondents, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which was a cornerstone of the

Court of Appeals' decision below, still governs Guantánamo notwithstanding the Court's more recent decisions in *Rasul I* and *Hamdan*; *Boumediene* applies only to the Suspension Clause and provides no support for the existence of any other right; and detainees seeking recognition of other rights, including the right not to be tortured, are left with the Sisyphean task of vindicating their rights, one iteration at a time. With respect, the Solicitor General's construction of *Boumediene* is insupportable. The right not to be tortured is fundamental. *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1932). Certiorari is necessary to provide clear affirmation that the "substantive guarantees of the *Fifth and Fourteenth Amendments*," 128 S. Ct. at 2246 (emphasis in original), which must include at a minimum the right not be tortured, are available to Guantánamo detainees.

In the alternative, petitioners invite the Court to consider a remand of the instant case to the Court of Appeals for further consideration in light of this Court's *Boumediene* decision. The Court of Appeals relied extensively on its own decision in *Boumediene*, which has now been reversed. The Petition and Opposition make clear that the parties have a substantial dispute concerning the implications of this Court's ruling in *Boumediene*. Petitioners submit that respondents' construction is wholly untenable, but, in any event, under these circumstances, the Court may wish to grant the petition for certiorari, vacate the decision below, and remand the case to the Court of Appeals for further consideration. *E.g.*, *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Stutson v. United States*, 516

U.S. 193 (1996). What the Court should not do is leave in place a decision that places no limit on the ability of U.S. officials to torture based on the Court of Appeals' now-overruled opinion in *Boumediene*.

III. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THE *BIVENS* CLAIMS.

Respondents rely (Opp'n 20) on *Wilson v. Layne*, 526 U.S. 603, 618 (1999), in support of their qualified immunity argument, stating that "if judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." In the context of the instant case, this argument is truly reprehensible. Respondents were not seeking to comply with their constitutional obligations; they were seeking to evade them by creating a legal black hole at Guantánamo where they could torture and abuse with impunity. This is not simply "picking the losing side"; respondents actively sought a premise that, in their view, allowed them to violate the law. Respondents' deliberate choice to engage in a geographic gamble is not the type of conduct that the doctrine of qualified immunity was created to protect. Qualified immunity protects officers who make a good faith but incorrect attempt to comply with the law, not those who try without success to create an enclave where compliance with law is unnecessary.

IV. CONCLUSION

This case calls out for this Court to draw a clear legal line for all U.S. officials against torturing detainees and humiliating them in the practice of their religion. Respondents' opposition makes clear that the captors of these detainees *still* do not believe that this Court's precedents prevent them from torturing detainees and that they *still* do not believe that detainees are "persons" entitled to practice their religion without abuse. If the decision below is left in place, these abhorrent and dishonorable practices can continue under a shield of legality. This Court can and should accept certiorari to reverse the Court of Appeals' decision that petitioners are non-persons lacking basic human rights.

Respectfully submitted,

/s/

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